United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-7082

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

HOWARD BERSCH,

Plaintiff-Appellee,

v.

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL & COMPANY, LTD., GUINNESS MAHON & CO., LTD., PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO., INC., J.H. CRANG & CO., INVESTORS OVERSEAS BANK LTD., ARTHUR ANDERSEN & CO., I.O.S. LTD.,

Defendants-Appellees,

BERNARD CORNFELD,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT BERNARD CORNFELD

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1. May a class action be maintained on behalf of a class consisting of 100,000 members where;

(a) 99.6% of the class members are non-resident aliens;

(b) a judgment in an American class action will not be afforded *res judicata* effect in their respective countries;

(c) pending proceedings concerning the same dispute are being actively litigated abroad by 395 members of the purported class;

(d) the problems of language, adjudication of foreign law and pendent claims, and resolution of claims based upon alleged non-uniform oral misrepresentations by the defendants may make the action unmanageable;

(e) individual questions of law and fact concerning reliance, materiality, causation and applicable laws predominate over questions common to the class; and

(f) plaintiff is not typical of the class he seeks to represent because he is an American resident who purchased shares before the publication date

of the prospectus which allegedly deceived the class members, and had a close personal relationship with an inside director and selling shareholder?

2. Should the District Court have limited the class to either:

(a) the 387 American citizens wherever resident who purchased IOS, Ltd. stock or, alternatively,

(b) the 37 purchasers who were American citizens and residents at the time of their purchase?

3. Did the District Court err in directing that notice, which purports to bind all class members, be sent to only a portion of the class, in failing to compel plaintiff to pay the cost of notice to the entire class and in refusing to send a notice in foreign languages in which the allegedly false prospectuses were published, where most of the class members are not literate in English?

STATEMENT OF THE CASE

This is an appeal by defendant Bernard Cornfeld ("Cornfeld") from an order by Judge Robert L. Carter of the United States District Court, filed and entered December 4, 1974, which directed that the first notice of any kind be given to a 100,000 member class*, and approved a notice stating that this action may be maintained as a class action by plaintiff as the representative of all persons who purchased the common stock of IOS in three public offerings in September 1969. (283A-295A)** The notice stated that recipients would all be members of the class unless they took action to opt out. (288A)

The background facts relating to this appeal are set forth at length in the brief of Arthur Andersen & Co. on appeal from the December 4, 1974 order and are incorporated here by reference. ***

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* The complaint estimates that the class consists of 100,000 people. (5A) The notice was approved in connection with a partial settlement of the action reached by defendants Banque Rothschild, Guinness Mahon & Co., Limited, Lexerd & Co., Inc., Pierson, Heldring & Pierson, and Smith, Barney & Co., Incorporated, with plaintiff. (283A)

** References are to the Appellants' Appendix filed in appeal 75-7038.

*** The related class action appeal by co-defendant Arthur Andersen & Co. has been assigned Docket No. 75-7079.

This is the first opportunity Cornfeld has had to seek review of the District Court's invocation of class action procedures. The present action was commenced on December 9, 1971. Plaintiff, however, made no attempt to serve Cornfeld for 17 months -- until May 15, 1973. Although Cornfeld was available for personal service in New York and California, as well as in Europe, plaintiff's first effort to serve him was made by an attempted substituted service in California on the day following Cornfeld's widely publicized arrest and imprisonment in Switzerland.* (192A-6-A-7)

During that seventeen month period plaintiff actively litigated this action against ten other defendants, who had been served promptly. On April 7, 1972 -- more than one year before plaintiff made his first attempt to serve Cornfeld -- plaintiff made a motion for a class action determination. (48A et seq) In a decision dated June 28, 1972, Judge Marvin Frankel conditionally granted

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* Plaintiff apparently concedes the invalidity of that purported service. In February 1974 -- 26 months after this action was filed -- plaintiff served Cornfeld by mail at the Swiss jail where Cornfeld was incarcerated. (278A)

class action treatment. (81A, et seq) Because plaintiff had not yet served Cornfeld, Cornfeld was unable to participate in that motion and was thus denied any voice in the consideration of the class action question.

In February 1974, pursuant to the order of Judge Sylvester J. Ryan dated December 20, 1973, Cornfeld made a motion to vacate or modify Judge Frankel's class action determination which had been expressly made tentative and subject to review by the judge to whom this case was assigned for all purposes (Judge Carter). (192A-1, et seq)

In his December 4, 1974, order, without expressly deciding Cornfeld's motion, Judge Carter nevertheless directed that the first notice be sent to all class members advising them, inter alia, that class action treatment had been granted.* This order was implicitly a denial of Cornfeld's class action motion, and was also the first formal order of Judge Carter which unconditionally directed that this case be granted class action status. Because of the plaintiff's inexcusable delay in prosecuting his action against Cornfeld, this order is Cornfeld's first opportunity to appeal the granting of class action treatment.

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* The mailing of the notice has been stayed by this Court pending the determination of the appeal concerning subject matter jurisdiction (Docket No. 75-7038)

POINT I

THE CLASS ACTION ORDER IS APPEALABLE

In Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974), and General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974), this Court adopted a three-pronged test for determining the appealability of class action orders:

> "(1) Whether the class action determination is 'fundamental to the further conduct of the case;'
>
> "(2) whether review of the order is 'separable from the merits;'
>
> "(3) whether that order will cause 'irreparable harm to a defendant in terms of time and money spent in defending a huge class action ...' "
>
> Kohn v. Royall, Koegel & Wells, supra, at 496 F.2d p. 1098.

See also Herbst v. International Telephone and Telegraph Corporation, 495 F.2d 1308 (2d Cir. 1974). These guidelines are clearly satisfied by this appeal.

First, class action determination is clearly fundamental to the further conduct of this case. Plaintiff purports to represent 100,000 class members throughout the world who purchased IOS stock under three offerings in

September 1969. Less than 400 of those purchasers were American citizens, and less than 40 were American residents. The defendants contend that even assuming, arguendo, that the District Court has subject matter jurisdiction over this controversy, fundamental policy considerations require that the class be limited in size to American purchasers or to American residents, who all bought in only one of the three offerings. (See infra, pp. 46-49). Furthermore, fundamental questions of notice to the class -- which Judge Frankel characterized as the "keystone ... matter of notice" -- must be resolved (see infra, pp. 31-32,48-53), as well as the critical issue of whether the notice must require members to affirmatively opt-in to participate in this action to avoid one-way intervention and the lack of res judicata effect in foreign courts of a judgment in a class action here (See infra, pp. 22-27).

The second test for appealability is also met here. Consideration of the class action question does not require an analysis of the merits of this case under American securities laws or the pendent claims raised by plaintiff and the class members. This is particularly true here where the only discovery to date has related to the threshhold issue of subject matter jurisdiction.

The third guideline -- whether the order will cause irreparable harm to the defendants in terms of time and money spent in defending this class action -- is also overwhelmingly satisfied. Vast sums of money and a great deal of time have already been expended by the defendants. Seven depositions have been conducted, thousands of pages of documents have been produced, extensive motion practice has been conducted and two appeals have been prosecuted. To date, the area of inquiry has been limited to subject matter jurisdiction and the class action issue. No preliminary proceedings have borne upon the merits.

If this action proceeds as a class action on behalf of 100,000 purchasers seeking $110,000,000 in damages, the defendants will be required to spend enormous sums of money in their defenses. These problems are compounded by the fact that 99.6% of the estimated 100,000 member class are foreigners resident all over the world. A reversal of the decision below to grant class action status -- or modification of the class to American citizens or residents -- will obviously have a substantial impact on the further conduct of this case. No reason exists to require the defendants to wait until after a final judgment in this action before this Court reviews the class action issue. The defendants should not be put

to the further expense of defending this huge class action if, as they contend, class action procedures are totally inappropriate here.

As the Court stated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-1226 (1949):

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

POINT II

CLASS ACTION STATUS SHOULD HAVE BEEN DENIED OR RESTRICTED

A. General Principles

A class action determination cannot be made by a slide-rule formula; rather, it depends upon a weighing of claimed benefits against administrative difficulties, fairness to the class and the defendants, and the availability of alternative procedures. As Judge Pollack observed in Morris v. Burchard, 51 F.R.D. 530, 536 (S.D.N.Y. 1971):

> "Class action, so instinct with benefits, is also fraught with mischievous effects, capable of overwhelming the judicial machinery and of imposing both unfair burdens and untoward procedures on the participants."

Moreover, the lower courts have been admonished not to utilize the mechanism of a class action to expand the jurisdiction of the court, i.e. to assume jurisdiction over actions or persons who would otherwise have no business before the district court. In Snyder v. Harris, 394 U.S. 332, 341 (1969), rehearing denied, 394 U.S. 1025 (1969), Mr. Justice Black spoke to this issue as follows:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system. Nor can

> we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts."

Similarly, in Eisen v. Carlisle and Jacquelin, 479 F.2d 1005, 1014 (2nd Cir. 1973), vacated and remanded, U.S. , 94 S.Ct. 2140 (1974), the court stated:

> "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation."

These general principles have been totally ignored below. Attempting to enlist the aid of Rule 23, plaintiff seeks to bring before this Court the myriad claims of more than 100,000 persons, 99.6% of whom are neither citizens nor residents of this nation. The subject matter of these claims is three offerings of stock of IOS, a Canadian corporation headquartered in Switzerland, which has never been listed or traded in this country, to such foreign residents and nationals. (192A-12, 169A-170A) The courts of Switzerland are presently accepting and adjudicating all such claims against Cornfeld. (192A-15-17,18) Class action procedures should not be utilized to extend the jurisdiction of this Court over these matters, which simply do not belong here.

In his conditional class action determination, Judge Frankel specifically identified the following troubling problems, among others, which were left to be resolved:

> (1) "[W]hether foreign purchasers will be entitled to invoke the protection and sanctions of American securities laws."
>
> (2) "[W]hether foreign investors . . . will be bound in their own courts by an adverse decision in the instant class action."
>
> (3) "[B]asic questions affecting the management of the case" including the "key-stone . . . matter of notice" to class members.
> [83A-84-A]

Without any explanation, Judge Carter resolved these and other fundamental issues in favor of notifying the class that class action status had been granted and that they would be included in the class if they received the notice and did nothing. (287A, et seq.)

B. Pending Swiss Proceedings

On plaintiff's initial class action motion of April 7, 1972 -- more than one year before any service was attempted on Cornfeld -- plaintiff's counsel contended that there was no other forum available in which any members of plaintiff's purported world-wide

class of 100,000 purchasers of IOS stock would seek relief. (53A) Plaintiff's mention of Swiss proceedings against Cornfeld stated that the action was criminal in nature and that because contingent fees are not permitted in Europe there was no likelihood of a class action being brought there. (Id) Plaintiff's counsel stated that "there was no way of knowing whether any damages would actually be sought" in the Swiss proceedings. (Bjork Aff't, April 7, 1972, p.2).

Plaintiff's description of the Swiss proceeding is wholly inaccurate and misleading. In fact, Swiss proceedings have been initiated by 395 IOS stock purchaser-complainants of 22 nationalities, including at least 18 Americans, and are being actively litigated against Cornfeld. (192A-15-17,18) Moreover, simplified arrangements have been made in Switzerland for the filing of form complaints by IOS stock purchasers and competent, aggressive Swiss counsel has been retained to represent their interest. (192A-15, 298A) More than 90 claims have already been resolved and testimony taken from purchasers, and negotiations involving 200 others are being actively conducted. (297A)

A circular dated October 18, 1971, was widely circulated in Europe on behalf of a committee formed to

represent purchasers of IOS stock. This circular states:

> "We are now at last in a position to follow through on the investigations commenced last year, in the matter of the defense of the interests of the IOS Swiss employees who have purchased stock in this company.
>
> "The undersigned have formed a Committee for the Defense of the said interests.
>
> "We have submitted the case for examination by an attorney who is specialized, and advise you herewith of criminal suit which he has filed and which we feel defines perfectly the grievances which we can hold against the IOS executives.
>
> "We have now come to the stage where we can file the complaint.
>
> "If you are still minded to go ahead, we shall ask you to fill in the blanks in the herewith complaint, giving your name, first name and address, all exact (page 1), and also the number of shares purchased and the total price of your purchase (page 4), and,finally, sign the complaint on the last page, then send it direct to Mr. Antoine Hafner, Attorney, 6, rue Bellot, Geneva, who will see that all the complaints are filed together with the Procurator General.
>
> "Please be sure -- as we have arranged with Atty Antoine Hafner -- to pay to him direct your share of the amount required, namely 1 fr. per share being satisfactory to him.
>
> "On the other hand, Atty Hafner reserves the right to demand payment of supplementary additional fees from our opponents, in case the complaint proves successful.

> "We urge you to join us in the filing of this complaint, as we have good reasons and grounds to believe that same will not only lead to a verdict against those responsible, but also to refund of the amounts paid in purchase of the shares. Of course, we are not in a position to guarantee to you this result, but the chances of success seem to us so favorable that it would be regretable to abandon the process now and that we will succeed in seeing that justice is done." (Emphasis added. 192A-15-16)

Swiss law permits intervention by civil parties in criminal proceedings. A Swiss judgment against the defendant would include complete damages or reparations for the purchase of IOS stock. This relief is being sought on behalf of the complainants in Switzerland. Both the wide circulation of the form complaint among prospective complainants in Europe, and the filing of the Swiss action against Cornfeld on November 5, 1971, preceded the filing of the purported class action in the present case. Moreover, in contrast to the large number of persons who have joined in the Swiss proceedings, not a single person has sought to join in the present American action in the four years it has been pending. (192A-16)

Although Swiss law does not permit class actions per se, the procedures adopted by Swiss counsel, including the simplified filing of form complaints, making arrangements for the compensation of counsel based on

the number of shares of the IOS stock purchased, and single representation of 395 complainants by one attorney bear a striking resemblance to certain aspects of a class action, and demonstrate the availability of an adequate forum for all plaintiffs. Of the 395 claims that have been processed in the Swiss judicial proceedings against Mr. Cornfeld (all of whom are members of the class plaintiff seeks to represent), 194 are claims of Swiss employees of IOS working in Switzerland or France; 89 are claims of non-Swiss IOS employees who purchased stock in the public offering while working for IOS in Switzerland; and 112 are claims of non-Swiss employee-purchasers of IOS stock employed by IOS in France. The claimants are of the following nationalities: American, German, Canadian, Australian, Italian, Indian, French, English, Turkish, Spanish, Portuguese, Greek, Chilean, Armenian, Sudanese, Danish, South African, Argentinian, Israeli, Dutch, Algerian and Austrian. (192A-17)

It is particularly significant that every one of the numerous claims filed in the Swiss proceedings are made on behalf of purchasers who bought IOS stock in only one of the three public offerings -- that made through Investors Overseas Bank Ltd. -- an IOS

subsidiary which sold to IOS sales representatives, employees, clients and others with a long standing relationship with IOS. The plaintiff in the present action, Howard Bersch, purchased his shares through the same Investors Overseas Bank, Ltd. offering as the hundreds of complainants in the Swiss proceedings. Neither Bersch nor any other American purchased in either of the other two offerings, although Bersch now seeks to represent the exclusively foreign purchasers on those offerings. Moreover, Bersch had a long-standing relationship with IOS as did the employee-complainants in the Swiss proceedings; Bersch previously worked for an IOS subsidiary and was employed by a firm which acted as a business consultant to IOS. (192A-17-18)

The complaints in the Swiss proceeding are based upon the same allegedly false and misleading prospectus as the New York proceeding. (192-18)

More than 90 claims in the Swiss proceeding have been settled after the taking of testimony from the individual claimants by the Swiss presiding official. In addition to the fees received directly from complainants in that action, plaintiff's counsel in Switzerland has received an additional 50,000 Swiss

Francs for representing that group. Additional funds will be received by complainants' counsel as part of any further settlement. Thus, plaintiff's suggestion that European counsel would not pursue relief in European courts because of the absence of contingent fees and the cost of litigation is totally unfounded. Substantial numbers of members in plaintiff's purported class have been and are continuing to be adequately represented in another forum by competent counsel who is being well compensated. (297A-298A)

The fact that so many individuals in plaintiff's position, with numerous claims both larger and smaller than his $6,000 claim, have participated in the Swiss proceedings, is itself substantial evidence that adequate remedies are available to the members of plaintiff's purported class without burdening an American court with a 100,000 member class action on behalf of foreign nationals on sales of stock of a Canadian corporation which took place almost entirely outside of the United States. It is apparent from the Swiss proceedings to date that citizens of any nationality may invoke the jurisdiction of the Swiss courts to pursue their claims relating to the purchase of IOS stock.

Indeed, Switzerland would be the normal jurisdiction for the adjudication of these matters. The complainants, who are almost all Europeans, purchased the stock of a corporation headquartered in Switzerland, where most records remain. They bought their stock in Europe, through European underwriters, or European branches of other underwriters. The prospectuses they saw were generally printed in their native languages, and stated on their face, in effect, that the American securities laws would not afford them any protection. Under these circumstances, the American courts should not become involved in this enormous undertaking, which is a controversy that can be adjudicated in Switzerland.

Moreover, IOS is presently in liquidation in Canada, pursuant to international understanding reached among several countries and the SEC, and appointed trustees have been representing the interest of IOS stockholders and creditors. (302A-305A; 378A-379A)

In Reynolds v. Texas Gulf Sulphur Company, 309 F.Supp. 566 (D.Utah, 1970), affirmed sub nom Mitchell v. Texas Gulf Sulphur Company, 446 F.2d 90 (10th Cir. 1971), cert. denied, 405 U.S. 918 (1972), plaintiff sought to represent, in the District of Utah, all persons who sold Texas Gulf Sulphur stock

between April 13, and April 16, 1964, consisting of several thousand prospective class members. Other actions had already been commenced by several of such sellers, in another district. The Court of Appeals affirmed the denial of class action status as follows:

> "The trial judge recited that as of October 22, 1969, ninety four actions had been brought against Texas Gulf Sulphur and individual defendants; that in March, 1969, two actions in the Southern District of New York had been allowed to proceed as class actions; that pursuant to that ruling, tedious and time consuming discovery had taken place and that if the various private suits were concentrated for trial in a single district, it should be in the Southern District of New York. In summary he stated: 'The litigation in New York is far advanced, far and away the bulk of the cases are there, and the information necessary to be obtained from the brokerage offices is more readily and conveniently available in New York City.' . . . Our conclusion is that the trial court has wisely exercised its discretion." [446 F.2d at 107]

Following the rule of this case, the resolution of the present controversy should be left to the courts of Switzerland, since, as in Reynolds, the litigation in Switzerland is farther advanced than the present action, the bulk of IOS purchasers reside in Europe, and the information relating to the substantive issues in the action, i.e. the statements

in the prospectuses and allegations of touting and market priming, are more readily and conveniently available in Switzerland, where IOS was headquartered. See also Sharp v. Hilleary Franchise Systems, Inc., 56 F.R.D. 34, 38 (E.D. Mo. 1972).

The Advisory Committee specifically addressed itself to this pertinent factor as follows:

> "In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of the individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical. . . ." [39 F.R.D. at 104]

The vigorous prosecution of the Swiss proceedings by the Swiss government and 395 private claimants demonstrates that this court should not inject itself into this essentially foreign controversy.

> "Bringing an individual before the court involuntarily is one of the strongest acts within a court's jurisdiction. Thus, it must not only be justified; it must be required to protect the rights of the individuals so joined. Accordingly, the class action rule should be invoked to enable parties to bring their claims before the court; it should not be invoked to force them to do so." [Pearson v. Ecological Science Corp., 17 F.R. Serv. 2d 1167, 1172 (S.D. Fla. 1973). Emphasis in original]

Furthermore, it would be contrary to the principle of fairness to all sides, and the efficient administration of justice which Rule 23 is designed to promote (Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1968)), to require any of the defendants to litigate essentially the same issues involving IOS shareholders in two different forums simultaneously. The continuance of this case as a class action would inflict precisely this burden upon Cornfeld.

C. Res Judicata Problems

If this suit proceeds as a class action, the pendency of the many complaints against Cornfeld in Switzerland raises substantial problems of res judicata and collateral estoppel for Cornfeld. Various affidavits from lawyers in Switzerland and other countries make clear that under Swiss law, and the law of other countries, a decision of an American court in this purported class action would not be binding abroad if class members did not affirmatively "opt-into" the class and agree to be bound by the American determination. (125A et seq; 145A et seq; 161A-1 et seq; 161A-17 et seq; 161A-28 et seq.) Even if the foreign purchasers

of IOS stock were forced to opt-in to the American proceedings in order to participate, the affidavits indicate that some foreign countries, particularly Switzerland, might still decline to apply the doctrine of res judicata because class actions are not recognized in those lands. (161A-39-41) This problem was recognized by Judge Frankel, who questioned whether foreign investors would be bound in their own courts by an adverse decision in an American class action, and stated that the defendants here are entitled to a complete victory -- including the principles of res judicata -- if successful in their defense. (83A)

This problem is particularly serious for Cornfeld if, as expected, the Swiss proceedings proceed to judgment before this case. The plaintiff here could then claim factual collateral estoppel if Cornfeld loses in Switzerland, but not be bound if Cornfeld wins, because plaintiff is not a party to the Swiss proceedings.

In the leading case of Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-7 (1921), the Court cautioned against permitting a "determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum

as to a part of the same class."

> "If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree."

An implicit finding in every case permitting a class action involving foreign nationals was the fact that the court's final determination would be forever binding upon them. See e.g. Advertising Special Nat. Ass'n v. FTC, 238 F.2d 108 at 120 (1st Cir. 1956). Such a finding cannot be made here.

The fundamental purpose of Rule 23 is to assure the "fair and efficient adjudication" of controversies. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969). Rule 23 was not designed to promote

judicial efficiency and economy at the expense of fundamental procedural and substantive rights of defendants. Eisen v. Carlisle and Jacquelin, supra 479 F.2d at 1013-1014. Indeed one of the major accomplishments achieved by amending Rule 23 was the assurance

> "That all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the classes; ...." [Advisory Committee's Notes, 39 F.R.D. 69, 99]

The 1966 amendments to Rule 23 were designed, in fact, to put an end to the "one-way intervention" presented here by which potential class members could permit themselves to be bound by the proceedings only after it became apparent that a result favorable to them would be achieved.

> "Hitherto, in a few actions conducted as 'spurious' class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision . . . . Under proposed subdivision (c)(3) one-way intervention is excluded; the action will have been early determined to be a class or a nonclass action, and in the former case the judgment, whether or not favorable,

> will include the class, as above stated." [Advisory Committee's Notes, 39 F.R.D. at 105-106]

As demonstrated in affidavits submitted to the court by foreign attorneys, a final judgment on the merits in this action would not bar similar lawsuits in other countries by IOS shareholders who want a second crack at the defendants.

The warning of Judge Fullam in Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D.Pa. 1968), is particularly appropriate:

> "[C]ourts should eschew applications of Rule 23 so expansive in scope as to permit a return to one-way intervention under a new guise. The difference between 'I will intervene if our side has already won' and 'If I find out our side has lost I will collaterally attack the judgment on due process grounds' may not be very great."

See also Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D.Ill. 1970), and Inmates of Milwaukee County Jail v. Petersen, 51 F.R.D. 540, 542 (E.D. Wis. 1971).

The manifest injustice of subjecting the defendants in this action to multiple liability requires that the class action aspect of this case be dismissed. Although actions against many of the defendants could be brought in other nations, the

problem facing Mr. Cornfeld is by no means conjectural. 395 claimants have already sued him in Switzerland, many of which have already been adjudicated. (192A-15).

D. Manageability: Class Size; Language; Notice; Foreign Law

It is apparent that plaintiff's purported class action would be totally unmanageable. The asserted class consists of over 100,000 persons. At least 99.6% of the purported class are foreign citizens and residents who purchased IOS stock in countries throughout the world other than the United States. It is estimated that plaintiff's class would encompass as many as one hundred countries, and citizens speaking twenty-five languages or more. (192A-20-21) Locating and notifying the purchasers of IOS stock five years ago, many of whom purchased in street name and who are scattered around the globe would impose insurmountable problems. It is obvious that to have any effect, notices would have to be sent in numerous foreign languages. The district court, however, directed that the notice to the class be sent only in English, over the objections of numerous defendants.*

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* See infra, pp. 48 et seq.

In the Swiss proceedings alone, claims have been filed by nationals of the following countries: United States, Germany, Canada, Australia, Italy, India, France, United Kingdom, Turkey, Spain, Portugal, Greece, Chile, The Sudan, Denmark, South Africa, Argentina, Israel, The Netherlands, Algeria and Austria. The Drexel, Harriman underwriting included more than 120 underwriters offering shares in Australia, The Bahamas, Belgium, Finland, France, Germany, Japan, Luxembourg, The Netherlands, Norway, Sweden and the United Kingdom. (192A-21) Moreover, the whole American concept of a class action is unknown in most other countries in the world, as is demonstrated by the affidavits submitted by foreign lawyers from France, England, Germany, Italy and Switzerland on behalf of other defendants. (supra, p.22 et seq) Thus, for example, under the lower court's order, a Frenchman who purchased IOS shares in France under a French propsectus would receive a notice in English concerning an American court action of a kind that neither he nor his local lawyer has ever before heard about and which is unknown to his system of law, and will be asked to make an intelligent choice concerning his participation, when there is substantial doubt that his actions would even be held to be binding by a French court, regardless

of the result here.

Such a class action would also enmesh an American court in considering the relevancy of, and applying the laws and policies of, as many as one hundred different nations whose citizens purchased IOS stock in their own countries -- not in the United States. Thus, the purchase of IOS stock by a German investor in Germany from a German underwriter would probably be governed by German law which has the most substantial contact with the transaction. Restatement (2d) Conflict of Laws §§ 148, 188. Multiplied one hundredfold the application of foreign law would present an American court with hopelessly complex issues. Indeed, the complaint's broad invocation of "pendant jurisdiction" in addition to American securities law claims would compound the choice of law problems facing this Court. (5A)

Foreign purchasers of IOS stock had no expectation that American securities laws governed their transactions. Nor were those laws designed to apply to sales of Canadian stock to foreign nationals abroad. In fact, the prospectuses in question contain the express language on their first page: "The common shares offered by this prospectus are not

registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or possessions of any areas subject to its jurisdiction . . . ." (168A, 184A) Imposing American securities laws under these circumstances would constitute an unwarranted interference with international contracts between foreign buyers and sellers.

Moreover, substantial problems would be encountered by the fact that many foreigners purchased IOS shares through foreign banks so that identification of the actual purchasers would be difficult since the shares are held in the equivalent of street name, and numerous foreign banks are subject to laws regarding the confidentiality of their clients. (192A-22) This would further compound the great problem of giving notice to class members.

In Schaffner v. Chemical Bank, 339 F.Supp. 329, 335 (S.D.N.Y. 1972), where a class action motion was denied, the court stated:

> "The key factor in any (b)(3) class action determination is ... an assessment of the difficulties likely to be encountered in the management of a class action."

The difficulties in the management of the

present lawsuit as a class action that are likely to be encountered are extraordinary.

The first problem to be faced involves providing notice to class members pursuant to Rule 23(c)(2). This poses the great difficulty of identifying class members because of foreign bank secrecy laws and purchases in street name. If class members cannot be identified, they cannot be given actual notice and the case may not proceed as a class action. Eisen v. Carlisle and Jacquelin, supra.

The Supreme Court emphasized in Eisen, supra, 94 S.Ct. at 2151, that notice to the class must be meaningful, and not mere gesture. Nevertheless the court below rejected the arguments by the non-settling defendants that the notice be translated into the four languages, besides English, employed in the IOB prospectus which class members allegedly relied upon -- i.e., French, Spanish, German and Italian. It is abundantly clear that an English language notice sent to class members abroad who are not literate in English will be meaningless. In Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 315, 70 S.Ct. 652, 657 (1950), the Court held that due process requires that the means employed in giving notice "must be such as one desirous of actually informing the absentee

might reasonably adopt to accomplish it." The approved notice does not satisfy this test.

Moreover, interpreters would have to be retained to prepare the various notices, taking into account grammatical and semantical considerations, and to assist in responding to inquiries from claimants unfamiliar with American court procedures. These management difficulties would be compounded by the difficult language hurdles created in evaluating proofs of claim which class members would be required to submit. See, e.g., Siegel v. Realty Equities Corp. of New York, 70 Civ. 4338 (S.D.N.Y. 1972); Harris v. Jones, 41 F.R.D. 70 (C.D. Utah 1966). The difficulties in preparing written interrogatories and evaluating the answers of thousands of class members (e.g., Brennan v. Midwestern United Life Ins. Co., 450 F. 2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972)) would be insurmountable. Plaintiff insists on the right to represent non-English speaking foreign purchasers, but asserts that the use of procedures involving the only languages they understand would make this class action unmanageable

Equally burdensome would be the difficulties of litigating under foreign laws, embodying a wide range of social policies. Choice of law rules would

require that such diverse foreign laws be applied to claims of foreign nationals. Restatement Second, Conflicts of Laws §§ 148, 188. Similarly, full use of discovery procedures afforded by the Federal Rules would be substantially interfered with by the world-wide scope of this case, and by the secrecy laws governing foreign banks, which this court would probably respect (United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968), especially since criminal penalties are imposed for disclosure of confidential financial information.

Furthermore, as discussed below, as many as 100,000 separate trials might very well be required on the issues of causation and reliance by individual class members. The unprecedented problems inherent in a class action where more than 99% of the class members are foreign nationals, where procedures would have to be conducted in a variety of foreign languages, and where diverse foreign laws embodying often fundamentally different social policies would have to be applied, would "transform a litigation into a gigantic burden on the Court's resources beyond its capacity to manage or effectively control." Morris v. Burchard, supra at p. 535.

As is discussed below, a class action may not be maintained where questions of law or fact not common to the class predominate. In this case, such non-common issues are significant. This factor must be considered by the court, not only in determining whether common issues predominate, as the rule requires, but also on the question of manageability. Uncommon issues will require separate adjudication for each of the more than 100,000 claimants. These issues will involve questions of law arising under many foreign legal systems, and questions of fact requiring testimony in each case. This kind of burden makes the entire underaking prohibitive. Pearson v. Ecological Science Corp., 17 F.R.Serv2d 1167 (S.D. Fla. 1973). See also Eisen v. Carlisle and Jacquelin, supra; Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

E. Claims of Touting and Market Priming

The complaint in this action itself demonstrates that issues of fact common to the class do not predominate over uncommon issues. The complaint goes far beyond the three offering prospectuses and specifically alleges that the purported class was defrauded as follows:

"10 (e) Various IOS officials engaged in violations of the antifraud provisions of the National Securities Laws, particularly 'gun-jumping' and 'market priming.' During the months preceding the IOS Public Offering, these officials, including defendant Cornfeld, touted IOS' prospects at press conferences, in brochures, at meetings of financial analysts' societies and on television.

* * *

"16. In the months prior to a contemplated public offering, an issuer should and usually does maintain a well-guarded silence. The purpose of this practice is to prevent excitement for a public offering based on chance remarks or incomplete brochures or pamphlets. IOS and its senior officers, prior to and in preparation for the public offering, made glowing statements concerning IOS and its future. IOS was referred to as 'the most important froce in the free world' and it was often estimated that IOS, by 1975, would have $15 billion under its management.

"17. Defendants IOS and Cornfeld knowingly and wilfully committed the aforedescribed fraudulent and deceptive acts. . .

"18(b). The participating Underwriters knew that defendant IOS and its senior officers had engaged in 'gun-jumping' and'market priming' activities. By participating in the IOS public Offering with knowledge of these facts, they aided and abetted the defendants IOS and Cornfeld in their scheme to defraud the class." (13A, 16A-17A, Emphasis added)

In short, the complaint contains numerous allegations that the 100,000 member class was defrauded by the fact that defendant Cornfeld and others

"touted" IOS and its stock in press conferences, on television, in speeches and brochures. Such claims are particularly ill-suited to class action treatment since they raise substantial questions concerning which members of the purported 100,000 member class heard or received the alleged "touting" statements, which relied upon them, and the like. This problem is compounded by the fact that the purchasers are spread among numerous countries, speak different languages and obviously did not receive or hear the same alleged statements. Proof of reliance, materiality and causation would have to be received from each individual class member since the alleged false oral and written statements upon which plaintiff claims the class relied were disseminated throughout the world in various forms and were not standardized. The single individual plaintiff, who resided in the United States, is in no position to assert these allegations on behalf of 100,000 different persons, 99% of whom are foreigners.

Numerous authorities deny class action status in cases where alleged "touting" statements or misrepresentations were not standarized, and were made unequally to members of the purported class.

The Advisory Committee has observed as follows, at 39 F.R.D. 103:

> "The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." (Emphasis added)

The varying degrees of exposure to allegedly improper or fraudulent public statements by Cornfeld and others, as well as their effect on the decision of class members throughout the world to purchase IOS stock, present precisely such uniquely individual questions that predominate over common issues. As in Morris v. Burchard, supra, at 51 F.R.D. 534:

> "The alleged misrepresentations were not standardized; they appear to have been disconnected series of oral

> statements, which must have varied from person to person and seemingly not made pursuant to a common course of conduct. No one of the variety of misstatements was necessarily brought to the attention of each individual purchaser."

In Simon v. Merrill, Lynch, Pierce, Fenner & Smith, 482 F.2d 880, 882-3 (5th Cir. 1973), the court denied class action status because of non-standardized representations, holding:

> "If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action. See Rule 23, Advisory Committee's Official Note, 39 F.R.D. 98, 197 (1966). Thus, courts usually hold that an action based substantially, as here, on oral rather than written misrepresentations cannot be maintained as a class action. See, e.g., Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971); Moscarelli v. Stamm, 288 F.Supp. 453 (E.D. N.Y. 1968): See also Comment, The Impact of Class Action on Rule 10b-5, 38 U.Chi.L. Rev. 337, 342 (1971). Similarly, if the writings contain material variations, emanate from several sources, or do not actually reach the subject investors, they are no more valid a basis for a class action than dissimilar oral representations. Cf. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964); Frankel v. Wyllie & Thornhill, Inc., 55 F.R.D. 330 (W.D.Va. 1972); Dolgow v. Anderson, 43 F.R.D. 472 (E.D N.Y. 1968); Richland v. Cheatham, 272 F.Supp. 148 (S.D.N.Y. 1967)."

Similarly, in Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Texas, 1972), the court observed that it was not clear that representations

made to the named plaintiffs, which included written and oral statements, were substantially the same as those made to other class members. In denying plaintiff's motion for class action determination, the court reasoned as follows at 54 F.R.D. 240:

> "The court finds the questions of fact and law common to the members of the classes alleged do not predominate over questions of fact and law affecting only individual members of the classes. Further, the Court finds that a class action in this particular case is not superior to other methods for the fair and efficient adjudication of this controversy. The continuance of this cause as a class action would not be in furtherance of the very purpose of the class action device, the prevention of a multiplicity of suits based on a common wrong. Due to the uniqueness of information supplied each member, the reliance each placed on the representations made to him, the reasonableness of his reliance and the damages suffered by each individual member, the continuance of this suit as a class action would serve only to defeat the purposes of the class action device and would produce a judicially unmanageable trial. Further, the prosecution of this suit as a class action would constitute an abuse of Rule 23, F.R.Civ.P."

See also Skydell v. Mates, CCH Securities Law Reports ¶93,538 (S.D.N.Y. 1972).

More recently, in Pearson v. Ecological Science Corp., supra, 17 F.R.Serv. 2d 1167, 1170

(S.D.Fla. 1973), the complaint claimed that the defendants had directed a "constant stream of false and misleading news releases, public relations material and financial statements" which allegedly misled and influenced plaintiff and members of the class. The court observed that not every member of the class could have relied on the defendants' massive public relations effort in the same manner or to the same extent:

> "Thus, in view of the requirement of establishing reliance on the communications, judicial proceedings would be necessitated to determine whether, in fact, each individual member of the proposed class relied upon any of the alleged misrepresentations spanning the three-year period. Such a determination would involve an analysis of the sophistication of each buyer, the extent of each buyer's own knowledge about Ecological Science Corporation, and the extent of each buyer's knowledge of the numerous alleged fraudulent representations."

The court further noted, at 17 F.R. Serv. 2d 1171-2, that the resolution of these non-common issues make the action unmanageable as a class action:

> "In short, when allegations of the consolidated amended complaint are analyzed, it becomes apparent that a just determination of the rights and liabilities of all parties present and potential to this lawsuit, would necessitate more than the finite capacities of judge and jurists to absorb the legal and factual situations sur-

> rounding the purchase of each share of Ecological stock during the relevant three and one-half year period of defendants' alleged fraudulent activities. Independent proof would be required as to whether, as alleged in plaintiffs' complaint, each member of the proposed class purchased Ecological stock as a result of the 'misleading,' 'enticing,' 'constant stream of false and misleading' communications; whether, as alleged by plaintiffs, the individual purchaser's investment decision 'was affected by the proxy statements. . .' Questions as to the common law of every state in which a potential member of the alleged class purchased Ecological stock would require resolution individual to each purchaser, a resolution mandating conflicting results arising from the application of the varying laws in the many relevant states.
>
> * * *
>
> "The preparation and presentation of the requisite proofs on, and the necessary resolution of, the questions individual to each purchaser . . . would result in totally unmanageable confusion in the courtroom, made a coliseum by such presentations on questions relevant only to individuals of the proposed class.
>
> "Such a result -- impairing the just application of the substantive law -- is neither the desire of this court nor the design of Rule 23."

Another predominant issue in this case, which varies among the 100,000 class members, is the question of which nation's substantive law is to be applied to each particular claim. Foreign nationals

purchasing IOS stock in foreign countries, after having received and relied upon representations made entirely in foreign countries, cannot look to American securities laws for relief. The problem is not solved merely by identifying a purchaser's nationality. The facts pertaining to each individual claim would require close scrutiny as to national contacts in order to determine which substantive law to apply.

This required factual review, in each case, to be followed by the application of the laws of different nations raise individual issues that clearly predominate over common questions. The differing state law pendent claims merely add to the confusion.

A far less overwhelming problem involving the adjudication of pendant claims resulted in denial of a class action in Adise v. Mather, 56 F.R.D. 492, 497 (D. Colorado 1972), where the court stated:

> "When we include in our consideration the third claim for relief based on violations of common law, and state statutory law, there is no question but that the individual questions overwhelmingly predominate over the common questions. This arises from the fact that the underwriters authorized to sell the initial issue of stock being located in 13 different states, sales were undoubtedly made in many

states, The common law and statutory laws of the state in which the transactions took place would govern. That the common law and statutory law governing fraud actions vary from state to state is illustrated by the discussion in 37 C.J.S. Fraud §2, p. 215 and the case citations thereunder.

"We need not belabor the point that the addition of this claim raises many questions of law and fact, the determination of which depends upon the law of the state in which the class member purchased his stock.

"We find that this action, considered in its entirety, raises individual questions which predominate over the questions of law and fact which are common to all members of the class. For this reason, the motion for the maintenance of this action as a class action should be denied.

"In making this finding, we have considered the difficulties of the management of this action as a class action. The difficulties are implicit in our finding that the questions common to the class do not predominate over the questions affecting only individual members.

"We conclude that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy."

In the present case, uncommon issues of fact clearly predominate, requiring the denial of class action status.

F. Plaintiff Is Not Typical Or Representative Of The Class

In Jacobs v. Paul Hardeman, Inc., 42 F.R.D. 595 (S.D.N.Y. 1967), it was noted that significantly different factual and legal differences between the claims of plaintiff and class members, as we have noted exist in this case, will render the representative's claims atypical and thus render class action an inappropriate method of adjusting a dispute. But in far more specific ways, Howard Bersch, the sole named plaintiff, is not typical or representative of the 100,000 class members he wishes to represent. First, Mr. Bersch purchased under only one of the three public offerings of IOS stock, that of Investors Overseas Bank, Ltd., whose sales were made to IOS employees and those closely associated with the company. He had nothing to do with the offerings of the Drexel Harriman group or the J. H. Crang offering which were made entirely to foreigners who were members of the general public, and he is in no position to represent purchasers at those two offerings. 395 individual purchasers under the same offering as Mr. Bersch -- all purported members of his class -- are already represented in Swiss proceedings. Second, Mr. Bersch's answers to interrogatories demonstrate that he did not rely on the prospectuses he claims to be false and

misleading. Hence he is not in any position to represent those who it is alleged so relied. In his answer to interrogatory number 23, plaintiff states that he purchased his shares on September 3, 1969, and forwarded his subscription and payment check to Geneva. The prospectuses, however, were dated September 24, 1969, and thus were not available to Mr. Bersch at the time he acknowledges making his purchase. Under these circumstances, Mr. Bersch is not in any position to represent those who purchased stock in the IOS public offerings "in reliance upon prospectuses which were false and misleading . . . and were damaged thereby." Complaint, ¶5. (192A-24,25; 5A)

Moreover, Mr. Bersch is hardly typical of the 100,000 IOS purchasers he claims to represent, who are almost all foreigners who purchased as members of the general public. In his answers to interrogatories, Mr. Bersch acknowledges working directly for Robert Sutner when he made his purchase. (28A, 42A, 43A) Mr. Sutner was both a director of IOS and one of the major selling shareholders in the public offering. (192A-25) Thus, Mr. Bersch's knowledge of the workings of IOS makes him atypical of the purported class.

Simon v. Merrill, Lynch, Pierce, Fenner and Smith, Inc., supra, 482 F.2d at 882 (5th Cir. 1973), is directly on point. There, both the trial court and the Court of Appeals

noted that a significant factor in the determination that the case should not proceed as a class action was the fact that plaintiff "had 'unique' access to information regarding SCC through that company's board chairman, his personal friend . . . ."

Bersch's access to Sutner, an IOS board member whose own shares were sold in the underwritings, require a similar finding that he is neither representative, nor typical, of the 100,000 member class he seeks to lead.

G. Narrowing The Class

The foregoing facts demonstrate that this case should not proceed as a class action under any circumstances. Clearly, and at the very least, the pendency and availability of foreign proceedings, the problems of res judicata, notice to foreigners, manageability, the dubious applicability of American law, and complex questions of foreign law, at the minimum require the exclusion of foreigners and Americans resident abroad from the purported class. Only then would the case be at all feasible to contend with.

When faced with similar problems, the court similarly strictly limited the class along geographical lines in Philadelphia Electric Co. v. Anaconda American Brass Co., supra. In addition, this limited group is the only class of which

plaintiff can in any way call himself a member.

> "In order to have standing to bring a class action, the class representative must first and foremost be a member of the class which he seeks to represent." [Huff v. N.D. Cass Company of Alabama, 468 F.2d 172 (5th Cir. 1972)]

In addition, purported members of a class cannot be represented in a class action if their individual claims lack the necessary subject matter jurisdiction. Rule 23 was not designed to expand federal jurisdiction. Zahn v. International Paper Company, 414 U.S. 291, 94 S.Ct. 505 (1973); Snyder v. Harris, 394 U.S. 332 (1969). This Court is presently considering the appeal by the defendants of Judge Carter's denial of a motion to dismiss for lack of subject matter jurisdiction. If the Court finds that any of the purchasers do not have a claim for relief under the federal securities laws, then the class would obviously have to exclude them.

Of the 100,000 members of the purported class of IOS stock purchasers, no more than 387 were American citizens. (192A-26) All were either IOS employees who worked and lived in Europe when they made their purchases of IOS stock, or had a close association or relationship to IOS. None of the American purchasers was a stranger to the company. Many already owned preferred stock in IOS or held options for such shares. As is reflected in the addresses of these purchasers, the

overwhelming majority are residents of Switzerland or France and can easily avail themselves of the pending Swiss proceedings. At least 18 of the American purchasers have already filed claims in the Swiss proceedings against Mr. Cornfeld. (Id.)

At most, only 37 American purchasers of IOS stock were residents of the United States when they made their purchase. This small group, of which plaintiff was a member, all purchased stock under one offering -- that of Investors Overseas Bank, Ltd. (Id.) This group is obviously manageable and presents no difficulties in terms of notice or language. Moreover, this group of American resident purchasers has the most contact with the United States and is best situated to invoke the arguable and tenuous protections of American securities laws. Even as to them, however, for the reasons set forth above, common questions of law and fact do not predominate, and a class action is not the best manner of adjudicating their claims.

H. The Proposed Partial Settlement And Notice

In addition to the error created by declining to require a notice printed in appropriate foreign languages*, the

* Supra, at pp. 31-32.

notice to the class and the accompanying order concerning the proposed partial settlement by some of the defendants violates the policy of Rule 23 and fundamental principles of due process.

The notice to the class clearly states that the settlement and all subsequent proceedings will be binding on all purchasers at the public offerings unless a member affirmatively excludes himself from the class. (288A) Nevertheless, the implementing order does not require any mandatory notice to purchasers through two of the three underwritings (i.e., IOB and J. H. Crang & Co.). (283A et seq.) The cost of mandatory notice to purchasers under the offerings of the settling defendants is to be borne by the settling defendants. In no case -- either with respect to the mandatory notice or the voluntary notice to purchasers through IOB and Crang -- is plaintiff to pay the cost of notice. This unprecedented procedure, which only requires that notice be sent to some class members, although it purports to bind all, is completely inconsistent with the unequivocal requirements of Eisen v. Carlisle and Jacquelin, supra, 94 S.Ct. at 2152:

> "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure

> that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 39 F.R.D., at 99, 105-106. Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

Not only is this procedure unauthorized, but so is the refusal of the District Court to require the plaintiff to pay the cost of notice. Id., 94 S.Ct. at 2153.

The scheme establishing the order and notice is particularly bizarre in permitting purchasers through J. H. Crang to participate in the settlement even though the District Court has dismissed the action against Crang for lack of personal jurisdiction. (280A)

Equally questionable is whether the notice adequately advised class members of the potential for no recovery at all against the non-settling defendants.

The stipulation of settlement provides that the plaintiff class must pay the attorneys' fees and litigation expenses of the settling defendants in defending cross-claims asserted by the non-settling defendants against the settling defendants. (248A) There is no basis whatever in law or public policy

which would permit the plaintiff class to be responsible for the legal fees of settling defendants under any circumstances.

There is a second provision in the settlement (p. [illegible], ¶4A(4)), that the defendants must actively defend cross-claims by the non-settling defendants and that they are prohibited from settling or compromising such cross-claims without the prior written approval of plaintiff's counsel. (Id.) This provision, which aligns the settling defendants and the plaintiff against the non-settling defendants, is absolutely prohibited by public policy and the right to contribution afforded by recent decisions under the securities laws. See, e.g., Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir. 1971), cert. denied, 404 U.S. 941, 92 S.Ct. 286 (1971); Liggett & Meyers Incorporated v. Bloomfield, 380 F. Supp. 1044 (S.D.N.Y. 1974).

The final paragraph of page 6 of the proposed notice and paragraph 4A(3) of page 4 of the stipulation of settlement provide that the plaintiff class automatically releases the non-settling defendants from any claims or causes of action on which the non-settling defendants successfully assert cross-claims for indemnity and contribution against the settling defendants. Under this bizarre provision, if the plaintiff class recovers $100 million against the non-settling defendants,

and the non-settling defendants successfully cross-claim for indemnification in this amount against the settling defendants (who were the lead underwriters in these offerings and who prepared the main prospectuses), then the plaintiff class receives nothing: -- because it automatically releases all of its claims against the non-settling defendants and settling defendants if these are successfully prosecuted as cross-claims against the settling defendants.(242A-293A; 247A-248A) This provision is so prejudicial to both the rights of the plaintiff class and of the non-settling defendants (which are made the targets of joint action by the plaintiff and settling defendants), that it must be deleted from the stipulation of settlement, and raises serious questions as to whether the plaintiff is properly representing the purported class.

Of critical significance is the failure of Judge Carter to direct that the class members be required to affirmatively "opt-in" to this action if they wish to be bound by any judgment.

As discussed above (pp.22-27), it has not been disputed by plaintiff that the courts of the foreign nations in which 99.6% of the class members reside would not recognize the validity of a judgment in an American class action. At best, those courts would afford res judicata effect to such

a judgment only where class members affirmatively entered into participation in the action. Under Judge Carter's notice, one-way intervention by upwards of 99,600 class members would be made possible despite the very clear policy against such an abuse of Rule 23.

I. Abuse of Rule 23

As the Court of Appeals for this circuit recently observed in Eisen v. Carlisle and Jacquelin, supra, the invocation of class action procedures is often subject to abuse. The court cited its approval of the remarks of Professor Milton Handler, reported at 71 Col L.R. 1, 9 (1971), in which he described certain class actions as "legalized blackmail."

The present case is apposite, and unprecedented. We have found no case -- nor has plaintiff cited any -- where a court has even been asked to adopt class action procedures to facts involving so few Americans and so many foreigners whose claims are predicated upon the laws of numerous foreign legal systems.

Plaintiff is required to sustain the burden of demonstrating that the case satisfies the requirements of Rule 23. Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968); Burstein v. Slote, 12 F. R. Serv. 23c 1, Case 2 (S.D.N.Y. 1968). He has not, and cannot, meet this burden.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Preston Anderson, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 980 Simpson St Bronx N.Y.

That on the 21 day of March 1975, deponent personally served the within Brief for Defendant Appellee Edward Cornfeld upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Sullivan + Cromwell
Attorneys for Defendants
Drexel Firestone, Inc., Pierson Heldring + Pierson
Guinness Mahon & Co. Ltd + Hill Samuel & Co. Ltd
48 Wall St.
New York, N.Y.

Preston Anderson

Sworn to before me this
21 day of March, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930308
Qualified in Bronx County
Commission Expires March 30, 1977

CONCLUSION

By all standards, this case does not belong in this Court. The class action determination should be vacated. The remarks of the Chief Justice are in point:

> "[T]he federal court system is for a limited purpose, and lawyers, the Congress and the public must examine carefully each demand they make on that system." Burger, The State of the Judiciary, 56 A.B.A.J., 929, 933 (1970).

Dated: New York, New York
March 21, 1975

Respectfully submitted,

GOLD, FARRELL & MARKS
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Of Counsel:

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Brief for Defendant-Appellant Bernard Cornfeld
this 21 day of March, 1975.

Sign Breed Abbott & Morgan
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Att'ys for Arthur Andersen & Co.
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Brief for Defendant-Appellant Bernard Cornfeld
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